Supreme Court, U.S.
FILED
FEB 6 - 2009
OFFICE OF THE CLERK

No. 08-855

In the
SUPREME COURT OF THE UNITED STATES

CLIFFORD CHARLES FOWLER,
Petitioner,

v.

LARRY CRAWFORD, et al.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

Petitioner is Clifford C. Fowler, an inmate in the Algoa Correctional Center in Jefferson City, Missouri.

Respondents are the Missouri Department of Corrections and various officials at the Department of Corrections: George Lombardi (as successor to Larry Crawford), Tom Clements (as successor of Terry Moore), Mike Kemna (as successor of Steve Long),[1] David Dormire, Arthur Wood, and Robert Joe Gibson (collectively, the Department).

STATEMENT OF THE CASE

Procedural History

Fowler, at the time an inmate incarcerated in Jefferson City Correctional Center (JCCC), brought this action pursuant to 42 U.S.C. § 1983 for alleged violations of his First Amendment rights and pursuant to the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc. In his original complaint, Fowler sought to have correctional officials provide him with an outdoor area and to construct a sweat lodge at JCCC for his use. In Fowler's First Amended Complaint, he dropped his request for an outdoor area, maintained his claims regarding the sweat lodge, and added claims regarding the alleged confiscation

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[1] Fowler sued the individual defendants in their official capacities. Larry Crawford has recently left his position as Director of the Department and was replaced by George Lombardi. Tom Clements has succeeded Terry Moore, and Mike Kemna succeeded Steve Long. Thus, pursuant to Fed. R. App. P. 43(c)(2), Lombardi, Clements, and Kemna are now defendants in this lawsuit.

of some religious items. Fowler also added claims for punitive damages against the Department and its officials.

The district court dismissed Fowler's claims regarding the confiscation of his religious items and his claims seeking punitive damages pursuant to 42 U.S.C. § 1983. (ECF Doc. No. 82). Both Fowler and the Department moved for summary judgment. In responding to the Department's motion for summary judgment, Fowler did not oppose judgment against him on his First Amendment claims, nor on any claims he had for punitive damages that were not already dismissed. (SJA 406 n.1). Accordingly, the only issue left for the district court to decide on summary judgment was Fowler's claim pursuant to RLUIPA seeking the construction and use of a sweat lodge at JCCC. The Honorable Nanette Laughrey determined that there was no dispute of material fact that would require a trial, denied Fowler's motion for summary judgment, and granted summary judgment for the Department. On appeal, the Court of Appeals for the Eighth Circuit affirmed.

Background

JCCC is a maximum security institution that houses approximately 1,973 adult offenders. (SJA 332, 373). Offenders at JCCC are incarcerated there because they have committed serious felonies; have committed a violent act while incarcerated; or are considered a security risk based on past records. (SJA 332-333, 373). Fowler is incarcerated in the Department for murder in the second degree and is serving a life sentence. (SJA 333, 401, ECF Doc. No. 1 at 1).

Fowler's Request for a Sweat Lodge and Outdoor Area

Fowler practices a Native American faith at JCCC, and according to his testimony, is of Cherokee descent. (SJA 380, 383). In addition to the practices already available to those who practice a Native American faith, Fowler requested further spiritual accommodations at JCCC, including an outdoor area to enable him and others who practice with him to have direct contact with the earth during prayer and to have the opportunity to burn sacred plants. *Id.* He also requested the construction and use of a sweat lodge. (SJA 92).

Native American Faith Practices Available to Offenders at JCCC

Offenders at JCCC who choose to may practice their Native American faith through both group and individual practices. (SJA 333, 350, 370). As a group, those offenders in general population who practice a Native American faith can meet twice a week, for two hours at each meeting. (SJA 333, 370). At these meetings, the group has access to drums and other religious items, including a buffalo skull. (SJA 333, 370, 395). The offenders use these meetings to relay oral traditions and sing ceremonial songs. (SJA 334, 381). Though in the past these meetings were confined to the nondenominational chapel area, subsequent to Fowler's request, officials at JCCC have worked to create an outdoor area that the group may use during their twice-weekly meetings, weather permitting. (SJA 334, 371, 375, 403).

The Native American faith group consisted of approximately six members. (SJA 334, 388). There is no volunteer-in-corrections (VIC) to supervise or lead this faith group's meetings at JCCC. (SJA 371).

Offenders may also practice their faith individually. (SJA 333, 350). They may possess numerous Native American items in their personal property, including: an individual pipe, an approved tobacco blend for personal use, a medicine bag, herbs, feathers, and a dream catcher. (SJA 333, 371). They may also wear their hair long, in accordance with their spiritual beliefs. (SJA 334, 383).

Description of the Sweat Lodge & Ceremony

The sweat lodge Fowler requests is a domed structure, approximately four feet tall and eight to ten feet across. (SJA 335, 387). It is formed by bending willow poles, which are approximately fourteen to sixteen feet long and an inch and a half in diameter. (SJA 335, 386-387). During ceremonial use, the poles are covered with a blanket and a tarp. (SJA 335, 389). It can accommodate between 12 to 15 inmates. (SJA 388).

The sweat lodge is a semi-permanent structure that would need to be replaced every four years. (SJA 335, 387). Fowler demands that the sweat lodge be used a minimum of seventeen times a year, depending on the lunar cycle. (SJA 335, 384-385). Each ceremony, called a sweat, would take from six to seven hours, from beginning to end. (SJA 335, 385-386).

During the ceremony, approximately thirty to forty rocks, each the size of a cantaloupe, are used. (SJA 335, 391-392). Offenders use firewood to build a fire, on which the rocks are heated. (SJA 335, 394). As a spiritual part of the ceremony, offenders tend the fire. (SJA 335, 392-393). Once the cantaloupe-sized rocks are heated, offenders pick them up with a shovel and take them to the door of the sweat lodge, where they are picked up with deer antlers and set inside the sweat lodge. (SJA 336, 390-391). Once the offenders are inside the sweat lodge, there are four rounds, which last from thirty minutes to an hour each. (SJA 336, 397). The door of the sweat lodge is closed for fifteen to twenty minutes of each round. (SJA 336, 396-397). During the ceremony, offenders use a bucket to pour water on the heated rocks to create steam. (SJA 336, 388, 396). Participants in the ceremony are clothed in shorts or a towel wrapped around the lower half of the body (SJA 336, 398-399).

Institutional Concerns about the Construction and Use of a Sweat Lodge

Incidents of violence have occurred at religious call-out times, with a heightened risk in religious groups not led by a Volunteer in Corrections. (SJA 374). For instance, offenders have used religious programming time to engage in sexual misconduct and to organize violence. (SJA 374, 595-598). The nature of the sweat lodge ceremony, particularly the fact that it is not openly visible to security personnel, heightens these security concerns. (Roper dep. 42:10-19, 55:3-4 at SJA 556, 558; Moore dep. at SJA 600-601; Long dep. 51:17-52:16 at SJA 564). The smoke from the sweat lodge also presents the risk that the scent will be used to mask the odor of illicit

substances. (SJA 374). And the items used in the sweat ceremony, including hot, cantaloupe-sized rocks, a shovel, and deer antlers, can be used as weapons. (SJA 558).

The six to seven hour sweat lodge ceremony, requested by Fowler is longer than the typical two-hour religious meetings held in JCCC, and would affect the way the institution keeps count of those offenders who participate in the ceremony. (SJA 375). In addition, extending additional programming to one group of offenders, and not to all offenders, presents a risk of creating resentment among the offender population, leading to heightened tension and the potential for unrest and disturbance among offenders. (SJA 375).

Building and maintaining a sweat lodge and facilitating sweat lodge ceremonies would consume considerable institutional financial and personnel resources. The extended program time required for the sweat lodge ceremony would expend many institutional personnel hours. (SJA 375). The labor-intensive nature of the sweat lodge activities diminishes the ability of staff to respond to security concerns and supervise inmates in other areas of the prison. (Roper dep. 45:17-47:21 at JA 556-557).

Sweat Lodge at PCC

Potosi Correctional Center (PCC) is a maximum security prison about half the size of JCCC. (Pet. App. 10). For over ten years, PCC operated a sweat lodge in fall and spring, with numerous restrictions, including that the sweats were supervised by a Native-American specialist, and then later, a Volunteer in Corrections;

supervision included taking care of the wood and rocks. (JA 68; SJA 448). PCC was selective in the inmates who were allowed to participate in the sweat lodge. screening out inmates who had poor institutional adjustment and a certain number of conduct violations. (SJA 448). The sweat lodge at PCC was discontinued due to security concerns, especially after a correctional official was stabbed in ar incident unrelated to the sweat lodge, as well as because of staffing cuts. budget issues, and inmate screening. (JA 68-72; SJA 378; Pet. App. 10).

RESPONSE TO REASONS TO GRANT PETITION

This Case is Moot

In his First Amended Complaint, Fowler sought only injunctive relief: to be transferred from JCCC to PCC, which, at the time was operating a sweat lodge; or to be allowed to have a sweat lodge at JCCC. But Fowler is no longer incarcerated at JCCC; as of December 30, 2008, Fowler is incarcerated at Algoa Correctional Center.

A request for injunctive relief from any conditions of confinement is moot after a transfer to another prison. *Preiser v. Newkirk*, 422 U.S. 395, 401-02 (1975); *see also Owens v. Isaac*, 487 F.3d 561, 564 (8th Cir. 2007) (citing *Martin v. Sergeant*, 780 F.2d 1334, 1337 (8th Cir. 1985)).

As Fowler is no longer at JCCC, his case is moot and his petition for certiorari to this Court should be denied.

There is No Circuit Split in how the Courts of Appeals Interpret RLUIPA

Less-Restrictive Alternatives

All circuits cited by Fowler – including the Eighth Circuit – follow this Court by applying the same standard in RLUIPA cases: strict scrutiny, but with due deference given to prison officials. *See Cutter v. Wilkinson*, 544 U.S. 709, 722-23 (2005); *Spratt v. Rhode Island Dept. of Corrections*, 482 F.3d 33, 38-39 (1st Cir. 2007); *Washington v. Klem*, 497 F.3d 272, 277, 283-84 (3d Cir. 2007); *Greene v. Solano Co. Jail*, 513 F.3d 982 (9th Cir. 2008); Pet. App. at 12-14.

Fowler claims that the First, Third, and Ninth Circuits require prison officials to demonstrate that they considered and rejected less-restrictive alternatives, but that the Eighth Circuit does not. (Petition at 12-13). This is simply not true. While the different circuits may not use the exact same language, they all require prison officials to show that they considered and rejected alternatives to the challenged policy. *See Spratt*, 482 F.3d at 41; *Washington*, 497 F.3d at 284; *Greene*, 513 F.3d at 989; Pet. App. at 19-20. Applying that standard, the Eighth Circuit in this case explicitly found that the Department considered alternatives – most of which were rejected by Fowler. (Pet. App. at 19-20). And the evidence presented by the Department supports that finding.

The Department suggested and implemented alternatives, such as an outdoor area and medicine wheel, but Fowler rejected all these alternatives; he will accept nothing less than a sweat lodge at JCCC

to be used a minimum of seventeen times a year. (JA 44). Additionally, the Department had operated a sweat lodge at a different prison – and operated less frequently and under more restrictive conditions than Fowler wants – for several years before discontinuing it due to security concerns after a corrections official was stabbed. Thus, the Department not only considered alternatives, it also tried one before finding it unworkable. (SJA 378).

Moreover, nothing in cases from other circuits show that they would have decided this case any differently than the Eighth Circuit did. Indeed, several of the other circuits have cited Eighth Circuit RLUIPA and RFRA[2] cases with approval, including *Hamilton v. Schriro*, 74 F.3d 1545 (8th Cir. 1996), the case relied on by the Eighth Circuit here. *See Spratt*, 482 F.3d at 41; *see also Washington*, 497 F.3d at 238; *Lovelace v. Lee*, 472 F.3d 174, 190 (4th Cir. 2006) (citing *Murphy v. Mo. Dept. of Corrections*, 372 F.3d 979, 186, 190 (8th Cir. 2004)).

The cases from other circuits cited by Fowler contained vastly different scenarios, both procedurally and factually. In those cases, prison officials had presented no evidence to support the compelling government interest or the least restrictive alternative. Instead, the allegations as to why the policy was necessary were merely conclusory. *See Spratt*, 482 F.3d at 39-41; *Washington*, 497 F.3d at 284; *Lovelace*, 472 F.3d at 190-91. Here, the Department produced significant

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[2] RLUIPA is the successor to RFRA, the Religious Freedom Restoration Act, and courts have used the same standard in analyzing cases brought under both statutes. *See Cutter*, 544 U.S. at 715-17.

evidence – including testimony from numerous prison officials listing specific examples of violence and sexual misconduct at religious callouts – that supported its assertion that there was a compelling government interest at stake and that their policy banning sweat lodges was the least restrictive alternative.

Further, the religious practices in the other cases were far less dangerous than the one at issue here. The other religious practices included group religious worship services, including Bible studies (*Greene*); inmate preaching (*Spratt*); keeping more than ten books in inmate property (*Washington*); and Ramadan meal accommodations (*Lovelace*). In fact, the First Circuit in *Spratt* distinguished its case from another in which it was "quite easy to see how armed prisoners" would cause a security problem. *Spratt*, 482 F.3d at 39 (citing *Ruiz v. Estelle*, 503 F.Supp. 1265, 1294-98 (S.D. Tex. 1980)).

But here, the sweat lodge would involve maximum security inmates having access to: fire; hot, cantaloupe-sized rocks; shovels; and deer antlers. The inmates would also be totally secluded in a small space that does not allow for any surveillance for six to seven hours at a time, a minimum of seventeen times a year. Common sense dictates that such practices would be a significant security risk. Indeed, as the Eighth Circuit noted, "no reasonable jurist, affording due deference to prison officials can dispute that serious safety and security concerns arise" from allowing maximum security inmates items that can be used as weapons while they are in "an enclosed area inaccessible to outside view." (Pet. App. at 17).

Fowler's main objection to the Department's policy is that he does not believe the alternatives suggested by the Department are true alternatives. (Petition at 19-20). Fowler's opinion notwithstanding, the Eighth Circuit found that the Department did consider and reject alternatives. (*Id.*). Simply because Fowler does not like the alternatives presented to him does not mean they are not viable alternatives. In Fowler's view, nothing less than a sweat lodge operated according to his requirements is acceptable; thus, an option that does not give him what he wants is not a true alternative. That would put the Department in the position of capitulating to Fowler's demands – regardless of the Department's legitimate security concerns. That is not what RLUIPA requires, nor are prison officials and the courts required to defer completely to the inmate's point of view.

There is nothing in the cases cited by Fowler to support his assertion that there is a circuit split. The First, Third, Fourth, Eighth, and Ninth Circuits apply RLUIPA using the same standard and all would have undoubtedly come to the same conclusion in this case.

Burden Shifting and Deference

Fowler claims that this Court's "due deference" language in *Cutter v. Wilkinson* led to a split among the Circuits as to the amount of deference given to the government. (Petition at 14-19). Fowler also claims that this deference has led to a split as to which party bears the burden under RLUIPA. (*Id.* at 15).

According to Fowler, in the First, Third, and Ninth Circuits, due deference does not impact prison officials' burden under the strict scrutiny standard. (Petition at 15). But, Fowler asserts, the Eighth Circuit focuses on deference to prison officials such that the Eighth Circuit applies a lesser standard than strict scrutiny. (*Id.* at 16). It appears that Fowler is conflating burden shifting with due deference, but this argument mischaracterizes what happened below.

As to the amount of deference given to prison officials, this Court in *Cutter* found that the courts must balance the religious practices of inmates with the government's compelling interests, such as security. *Cutter*, 544 U.S. at 722-23. And the courts have been doing exactly that: balancing the competing interests based on the unique circumstances of each case. The courts have given deference to prison officials' expertise and experience, but have not rubber-stamped prison officials' decisions. *See Spratt*, 482 F.3d at 40; *Lovelace*, 472 F.3d at 190.

And there is nothing in the Eighth Circuit's opinion in *Fowler* to show that the district court improperly shifted the burden of proof. This case was decided on summary judgment. (Pet. App. at 2). Accordingly, under Federal Rule of Civil Procedure 56(e), once defendants produced evidence in their motion for summary judgment, the burden of *production* shifted to Fowler for his summary judgment response. The burden of *persuasion* always remained with the Department. (Pet. App. at 20-21). Fowler did not counter the Department's evidence sufficiently to create a genuine issue of material fact that would preclude summary

judgment. (Pet. App. 42-43). There was no improper shifting of the burden of proof.

There is no circuit split in the amount of deference given to the government, nor with respect to the allocation of the burden of proof. The Eighth Circuit correctly applied this Court's standard from *Cutter*. There are no grounds to support granting certiorari in this case.

CONCLUSION

For the foregoing reasons, the Court should deny the petition.

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